SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 436

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET AL.,

Appellants,

vs.

ROY S. WILSON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTIONS OF APPELLEE TO DISMISS OR AFFIRM

These motions are filed by the appellee pursuant to paragraph 3 of Rule 12 of the Rules of the Supreme Court, in response to the statement as to jurisdiction and other papers filed by the appellants, which urge the Supreme Court to review on appeal the judgment entered by the United States District Court for the Eastern District of Louisiana.

Statement

This case was filed in the United States District Court for the Eastern District of Louisiana on September 13, 1950. The appellee on his own behalf and on behalf of other Negro citizens of Louisiana similarly situated sought a preliminary and a final injunction against appellants who are state officers being the Board of Supervisors of Louisiana State University and administrative officers of said institution to restrain them from enforcing an order which prevented the appellee and other qualified Negroes from attending the law school of Louisiana State University.

A statutory court of three judges was convened and appellee's application for a temporary injunction was heard on September 29, 1950 upon the pleadings, depositions and affidavits. Appellant's motion to dismiss the action as a class action was heard at the same time.

On October 7, 1950 the District Court filed its findings of fact and conclusions of law. Final judgment was entered on October 30, 1950 granting the preliminary injunction. Order allowing an appeal to the Supreme Court was signed the same day.

There is no dispute as to the facts in this case. The appellee is admittedly qualified for admission to the law school of Louisiana State University. He applied for admission during the period other students were applying for the 1950-51 school year and his application was refused.

The State of Louisiana maintains separate schools for its Negro and white students. The State maintains an institution known as the Louisiana State University and Agricultural and Mechanical College which has been in existence since 1859. It also maintains Southern University for Negro students.

Louisiana State University has maintained a Department of Law since 1906. Southern University has had a law

school since 1947. A comparison of the two law schools appears in the depositions of the Deans of the respective schools.

It is conceded that there is no statute or provision of the Constitution of the State of Louisiana which by its terms denies to Negroes admission to Louisiana State University. However, it is the policy of the appellant Board of Supervisors of said institution to deny Negroes admission solely because of their race and color.

Louisiana State University has twelve colleges and several divisions and is accredited by every recognized accrediting agency. It accepts all qualified students except Negroes. Except for the law school, Southern University is a college and not a university.

The District Court found that "the Law School of Southern University does not afford to plaintiff educational advantages equal or substantially equal to those that he would receive if admitted to the Department of Law of the Louisiana State University and Agricultural and Mechanical College."

Order Involved

It is conceded that there is no statute or provision of the Constitution of the State of Louisiana which by its term denies to Negroes admission to Louisiana State University.

Appellee and others in the class on whose behalf he sues were denied admission to the law school of Louisiana State University because of the order of the Board of Supervisors of said institution which provides:

> "Be It Resolved that pursuant to the laws of Louisiana and the policies of this Board the administrative officers are hereby directed to deny admission to the following applicants: Nephus Jefferson, Dan Columbus Simon, Willie Cleveland Patterson, Charles Edward Coney, Joseph H. Miller, Jr., Roy Samuel Wilson, Lloyd E. Milburn, Lawrence Alvin Smith, Jr., James Lee

Perkins, Edison George Hogan, Harry A. Wilson, Anderson Williams."

Argument

The Statement as to Jurisdiction filed by the appellants relies upon the Assignment of Errors filed therewith and these motions are addressed to both the Statement of Jurisdiction and the Assignment of Errors.

I

In paragraph 1 of their assignment of errors, appellants allege that the District Court erred in holding that as a matter of law it was vested with jurisdiction of appellee's application for an interlocutory injunction against appellants' order which denied appellee's admission to Louisiana State University and Agricultural and Mechanical College in the terms set forth. This allegation is without merit for the following reasons:

(a) Title 28 U.S.C., section 2281 provides that a three-judge court shall hear all cases wherein plaintiff seeks to enjoin "the enforcement or execution of an order made by an administrative board or commission acting under State statutes" on the ground of its unconstitutionality. The statute under which the board herein acted, and the board's order denying admission present a procedural picture almost identical to that present in *McLaurin* v. *Oklahoma*, — U. S. —, 70 Sup. Ct. 851, decided by this Court this year. In the *McLaurin* case, *supra*, there was a board operating under a statute which provided that the board be constituted "a body corporate . . ." and had "all the powers necessary or convenient to accomplish the objectives and perform the duties prescribed by law." Title 70 Okla. Stat., section 1242. The statute under which appellant board herein operates provides that it "shall constitute a body corporate and

have power and authority to perform all acts for the benefit of the University which are incident to bodies corporate" and "to adopt and alter all rules and regulations which may be deemed necessary or convenient to accomplish the objectives and perform the duties prescribed by law . . ." Louisiana General Statutes (Dart) Section 2503.3.

Operating under the Oklahoma statute, the Oklahoma State Regents issued the following order:

> "That the Board of Regents of the University of Oklahoma authorize and direct the President of the University, and the appropriate officials of the University, to grant the application for admission to the Graduate College of G. W. McLaurin in time for Mr. McLaurin to enroll at the beginning of the term, under such rules and regulations as to segregation as the President of the University shall consider to afford to Mr. G. W. McLaurin substantially equal educational opportunities as are afforded to other persons seeking the same education in the Graduate College and that the President of the University promulgate such regulations."

Almost parallel thereto is the order of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, which states:

> "Be It Resolved that pursuant to the laws of Louisiana and the policies of this Board the administrative officers are hereby directed to deny admission to the following applicants: Nephus Jefferson, Dan Columbus Simon, Willie Cleveland Patterson, Charles Edward Coney, Joseph H. Miller, Jr., Roy Samuel Wilson, Lloyd E. Milburn, Lawrence Alvin Smith, Jr., James Lee Perkins, Edison George Hogan, Harry A. Wilson, Anderson Williams."

The order herein involved is of the same type as the order in the *McLaurin* case. The authorizing statutes in the

two cases are almost identical. This assignment of error is therefore without merit.

II

The appellants other assignments of errors are likewise without merit.

(a) It is alleged that the Court was without jurisdiction "because no state statute is being attacked." This contention was answered by the District Court in its citation of *Oklahoma Natural Gas Company* v. *Russel,* 261 U. S. 290, In that case, Mr. Justice Holmes wrote:

> "So, if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this court has assumed repeatedly that the section was to be taken more broadly . . . We mention the matter simply to put doubts to rest." (261 U. S. at 292)

(b) The assignment of error then asserts that the order attacked herein is not "an order made by an administrative board or commission acting under State statutes such as is cognizable by a three-judge court in view of the decisions in the cases of *Railroad Commission of Texas* v. *Pullman Company,* 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971; *Phillips* v. *United States,* 312 U. S. 246, 61 S. Ct. 480, 85 L. Ed. 800 and *Borges* v. *Loftis,* 87 F. 2d 734, 301 U. S. 687, 57 S. Ct. 789, 81 L. Ed. 1344, 301 U. S. 714, 57 Sup. Ct. 928, 81 L. Ed. 1365." Appellee submits that the cases in no way control this case. The *Railroad Commission* case, first did not determine the jurisdiction or lack thereof, of a three-judge court. It was a case which decided that equity, in its discretion should not enter the field of federal-state relations until after the resolution of an ambiguous state statute by state courts. Moreover, the ambiguity in question left

undecided whether the Railroad Commission had the power to issue the order under attack:

> "It is common ground that if the order is within the Commission's authority its subject matter must be included in the Commission's power to prevent 'unjust discrimination . . . and to prevent any and all other abuses' in the conduct of railroads. Whether arrangements pertaining to the staff of Pullman cars are covered by the Texas concept of 'discrimination' is far from clear. What practices of the railroads may be deemed to be 'abuses' subject to the Commission's correction is equally doubtful. Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas." (312 U. S. at 499)

The case was then remanded to the same three-judge district court before which it had been brought with instructions for said court to retain jurisdiction until resolution of the ambiguity by state courts. This action in itself shows that the *Pullman* case did not define any situation in which a three-judge court *does not* have jurisdiction.

Herein there is no question of the Board's power to issue the order excluding appellee. The statute under which the board operates is clear, and neither party has questioned the power which it confers.

The *Phillips* case, *supra*, merely decided that the governor of Oklahoma, acting in his gubernatorial capacity as "Commander in Chief of the Militia of the State" was not enforcing a statute, nor acting as an administrative board, nor enforcing the orders of such board, and was therefore not subject to attack via three-judge court procedure. Concerning alleged jurisdiction stemming from a statute, the opinions stated:

> "In other words, it seeks a restraint not of a statute but of an executive action." (312 U. S. at 252)

On the jurisdictional question insofar as a three-judge court was concerned the opinion distinguished the case from the case of *Sterling* v. *Constantin*, 287 U. S. 378 wherein it was stated:

> "The Governor was sought to be restrained as part of the main objective to enjoin 'the execution of an order made by an administrative . . . commission,' and as such was indubitably within § 268." (Ibid at 253)

The third case which appellants cite is *Borges* v. *Loftis*, *supra*. The *Borges* case involved a county ordinance requiring that cattle should be subjected to a test for tuberculosis, and that tubercular cattle should be slaughtered. The Court of Appeals held that the action was premature. The Court stated:

> ". . . until there is an adverse finding as to the health of some or all of their cattle, appellants who alleged that their cattle are free from disease cannot involve the aid of the court upon the assumption that

> a well-recognized scientific test required by the ordinance will show such healthy cattle to be diseased." (87 F. 2d at 735)

The court also stated that the county ordinance there in issue was not a state statute within the meaning of what is now Title 28 U.S.C. § 2281.

The order in this case, and the board issuing it, are essentially similar to the order and board in *McLaurin* v. *Oklahoma, supra,* as hereinbefore stated.

III

The other assignments of error are directed: (a) to the finding that the State of Louisiana "does not afford to the plaintiff educational advantages equal to those he would receive if admitted to the Department of Law of Louisiana State University and Mechanical College;" and (b) to the conclusion of law that the enforcement of the order involved "denies a right guaranteed to plaintiff by the Fourteenth Amendment and that enforcement of the order, pending final hearing, would inflict irreparable damages upon the plaintiff.

The finding that the law school education offered the appellee in the segregated law school for Negroes was not equal to that offered all other qualified applicants to Louisiana State University was in direct conformity with the decision of the Supreme Court in the case of *Sweatt* v. *Painter.*

With this finding of fact there can be no doubt that such inequality denies to the appellee the equal protection of the laws guaranteed him by the Fourteenth Amendment.

Conclusion

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgment of the District Court of the United States for the Eastern District of Louisiana be affirmed.

A. P. TUREAUD,
612 Iberville St.,
New Orleans, La.,
THURGOOD MARSHALL,
20 West 40th Street,
New York, New York,
Counsel for Appellees.

Dated: November 13, 1950.

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